

**ILLINOIS COMMERCE COMMISSION**

April 30, 2004

Village of Western Springs, an Illinois municipal corporation,
Petitioner,

v.

State of Illinois, Department of Transportation, Division of
Highways and Burlington Northern and Santa Fe Railway
Company, a Delaware corporation,
Respondents.

T04-0041

Verified Uncontested Petition For An Order Of The Illinois
Commission Authorizing The Construction Of A Pedestrian
Underpass Crossing Respondent Burlington Northern And Santa
Fe Railway Company's ("BNSF") Rail Corridor At Approximately
Milepost 14.95 Of BNSF's Chicago Division, Chicago Subdivision,
Line Segment 71, Located In The Village Of Western Springs, And
Assigning Construction Costs To The Petitioner Village Of
Western Springs, And Respondent BNSF And Authorizing The
Expenditure Of Grade Crossing Protection Funds To Pay A Portion
Of These Costs.

T04-0041
Page 2 (continued)

Mr. Michael T. Jurusik
Klein, Thorpe and Jenkins, Ltd.
20 N. Wacker Dr., Ste. 1660
Chicago, IL 60606-2903

Dear Mr. Jurusik:

Receipt is acknowledged of the original and four (4) copies of the Petition filed April 29, 2004 in the above matter.

All future correspondence/pleadings should be filed with an original and two (2) copies and addressed to: Mr. Dave Lazarides, Acting Director of Processing, Illinois Commerce Commission, 527 E. Capitol Avenue, Springfield, IL 62701 or you may file electronically through E-Docket if you have an account. To apply for an account, please log on to www.icc.state.il.us and apply for an E-docket account.

Processing and Information Section

kl
cc: Mr. Victor A. Modeer, IDOT
Mr. W. Douglas Werner, BNSF
Ms. Cheryl Townlian, BNSF
C T Corporation System, BNSF
Village of Western Springs, President/Clerk

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STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

RECEIVED
APR 29 2004

Illinois Commerce Commission
RAIL SAFETY SECTION

VILLAGE OF WESTERN SPRINGS,)
an Illinois municipal corporation,)

Petitioner,)

v.)

STATE OF ILLINOIS, DEPARTMENT)
OF TRANSPORTATION, DIVISION)
OF HIGHWAYS, and BURLINGTON)
NORTHERN AND SANTA FE)
RAILWAY COMPANY, a Delaware)
Corporation,)

Respondents.)

No. T04-0041

**VERIFIED UNCONTESTED PETITION FOR AN ORDER OF THE ILLINOIS
COMMERCE COMMISSION AUTHORIZING THE CONSTRUCTION OF A
PEDESTRIAN UNDERPASS CROSSING RESPONDENT BURLINGTON
NORTHERN AND SANTA FE RAILWAY COMPANY'S ("BNSF") RAIL
CORRIDOR AT APPROXIMATELY MILEPOST 14.95 OF BNSF'S CHICAGO
DIVISION, CHICAGO SUBDIVISION, LINE SEGMENT 71, LOCATED IN THE
VILLAGE OF WESTERN SPRINGS, AND ASSIGNING CONSTRUCTION
COSTS TO THE PETITIONER VILLAGE OF WESTERN SPRINGS, AND
RESPONDENT BNSF AND AUTHORIZING THE EXPENDITURE OF GRADE
CROSSING
PROTECTION FUNDS TO PAY A PORTION OF THESE COSTS**

PETITIONER, THE VILLAGE OF WESTERN SPRINGS ("Western Springs"), an Illinois municipal corporation, with its principal office at 740 Hillgrove Avenue, Western Springs, Illinois 60558-1409, by Michael T. Jurusik and Jacob H. Karaca of Klein, Thorpe and Jenkins, Ltd., its attorneys, respectfully petitions the Illinois Commerce Commission (the "Commission") as follows:

1. Western Springs names the State of Illinois, the Department of Transportation Division of Highways ("IDOT"), with its principal offices at 2300 South Dirksen Parkway, Springfield, Illinois 62764, and The Burlington Northern and Santa Fe Railway Company ("BNSF"), a Delaware Corporation, with its principal offices at 2650 Lou Menk Drive, 2nd Floor, P.O. Box 961057, Fort Worth, Texas 76161-0057, as the Respondents to this Petition.

2. In support of this Verified Uncontested Petition, Western Springs has attached the following Exhibits and incorporates and makes said Exhibits a part of this Petition:

- a. Exhibit 1 - Cooperative Agreement entered into between Western Springs and BNSF; and
- b. Exhibit 1A - Project, Design and Engineering Plans.

All references in this Petition to exhibits contained in the Project Plans shall be described as "Exhibit ___ of Project Plans."

3. The Project Plans call for the installation of one pedestrian underpass in the Village of Western Springs, Illinois, to be located at approximately milepost 14.95 ("Pedestrian Underpass No. 1") of BNSF's line segment 71, in the Chicago Subdivision of the Chicago Division. It is anticipated by the parties that a second pedestrian underpass shall be constructed sometime in calendar year 2005 at milepost 15.72 ("Pedestrian Underpass No. 2") of BNSF's line segment 71, in the Chicago Subdivision of the Chicago Division in conjunction with the closure of a pedestrian crossing at milepost 15.59, but this Petition is not seeking approval for the construction of Pedestrian Underpass No. 2 and closing of pedestrian

crossing at milepost 15.59. BNSF and Western Springs anticipate moving forward with Pedestrian Underpass No. 2 after they have evaluated the final, actual costs of construction of Pedestrian Underpass No. 1, the availability of federal, state, county and local funds for Pedestrian Underpass No. 2, and have entered into a Cooperation Agreement similar in form to Exhibit 1. The parties anticipate another Petition seeking approval for Pedestrian Underpass No. 2 in calendar year 2004 or early 2005.

4. Pedestrian Underpass No. 1 is to be located between Hillgrove Avenue to the north and Burlington Avenue to the south, just east of Clausen Avenue. It is anticipated that Pedestrian Underpass No. 1 will be constructed in calendar year 2004. The construction of Pedestrian Underpass No. 1 will allow for more convenient pedestrian access between Hillgrove Avenue and Burlington Avenue, especially for pedestrian traffic that seeks access to Field Park and the Field Park School, which are located north of the BNSF railroad tracks and between the Wolf Road and Gilbert Avenue at-grade intersections.

5. Under the Cooperative Agreement, BNSF has granted Western Springs a Construction License and Operating License relative to certain BNSF real property on which the Pedestrian Underpass No. 1 improvements shall be constructed and operated. (See Section 2 of the Cooperative Agreement; Exhibit B.) The precise location of the areas of real property covered by the Construction License and Operating License are set forth at Exhibit D of the Cooperative Agreement.

6. The costs associated with the construction of Pedestrian Underpass No. 1 are to be allocated as follows: Western Springs shall pay an amount not to exceed \$624,430.00 for the BNSF-assigned work and BNSF shall pay for all costs in excess of \$624,430.00 that are incurred in completing the BNSF-assigned work. (See Section 1(a) of the Cooperative Agreement.) Western Springs shall pay the cost of all BNSF-provided flagging for Western Springs' contractors, other non BNSF-assigned work and its own assigned work as part of the construction of Pedestrian Underpass No. 1. (See Section 1(b) of Cooperative Agreement.)

7. Respondents BNSF and IDOT have no objection to the construction of Pedestrian Underpass No. 1.

8. Western Springs will pay up to \$624,430.00 of the cost of BNSF Work, provided that it receives or is allocated said funds from a pending Federal Grant. BNSF will pay the difference between the cost of the BNSF Work and \$624,430.00 (the "Excess Costs"). BNSF will not be reimbursed by Western Springs for any Excess Costs paid by BNSF.

9. Pedestrian Underpass No. 1 improvements set forth in the Project Plans are necessary and in the public's safety, interest and convenience for the following reasons:

- a. An increase in the number of families with small children in Western Springs has caused increased pedestrian traffic at and around the BNSF in the vicinity of the proposed at-grade railroad track/pedestrian crossing area and has created the

need to improve the level of safety for those individuals who desire to or need to cross the railroad tracks;

- b. The current at-grade crossings at milepost 14.77 (Gilbert Avenue and Hillgrove/Burlington Avenues) and milepost 15.29 (Wolf Road and Hillgrove/Burlington Avenues) pose significantly higher risks for injuries and fatalities than would the proposed Pedestrian Underpass No. 1; and
- c. The proposed Pedestrian Underpass No. 1 would benefit the public safety by reducing the pedestrian traffic using the existing BNSF at-grade crossings.
- d. The proposed Pedestrian Underpass No. 1 is designed to improve pedestrian safety by offering pedestrian traffic an alternative, below grade underpass route to access Burlington Avenue and Hillgrove Avenue instead of utilizing the BNSF at-grade crossings at Gilbert Avenue and Wolf Road.

10. Pursuant to 625 ILCS 5/18c-7401, Western Springs requests that the Commission grant it permission to construct Pedestrian Underpass No. 1 improvements in conformance with the design and engineering plans and specifications set forth in the Project Plans (See attached Exhibit 1A).

11. In the event the Commission approves of the Pedestrian Underpass No. 1 improvements set forth in the Project Plans, Western Springs, working through IDOT, anticipates bidding the construction contract for Pedestrian

Underpass No. 1 in June 2004, and awarding a contract for construction of the proposed improvements in July 2004.

12. All improvements to the Pedestrian Underpass No. 1 area and other related necessary facilities will be constructed in conformance with the plans and specifications set forth in the Project Plans (See Exhibit 1A). All of the proposed improvements set forth in the Project Plans will lie within the corporate limits of Western Springs. Upon completion, all of the Pedestrian Underpass No. 1 improvements, except those areas of railroad tracks and surrounding real property owned by BNSF and not included within the Operating License, will be maintained by and at the expense of Western Springs in accordance with the terms of the Cooperative Agreement.

13. It is estimated that the Pedestrian Underpass No. 1 improvements as set forth in the Project Plans shall be completed within a three-month period, but the parties have given themselves a 36-month time period to complete the project. (See Section 6 of the Cooperation Agreement; Exhibit 1.) During the construction period, temporary closing of various Western Springs rights-of-way may be necessary, including portions of Hillgrove and Burlington Avenues, and will be done in order to establish necessary safety precautions.

14. Pedestrian Underpass No.1 improvements will be constructed, subject to the approval of the Commission, in conformance with the requirements of the regulations contained in 625 ILCS 5/18c-7401, as amended, 92 Illinois Administrative Code 1535.203, and all other applicable standards, rules and regulations.

15. The total cost of construction of Pedestrian Underpass No. 1, including construction costs, engineering services and all other related facilities, is estimated to be approximately \$624,430.00 for construction year 2004.

16. All of the proposed improvements of Pedestrian Underpass No. 1 will be constructed in conformance with all Commission and IDOT requirements and regulations. Therefore, Western Springs requests that permission be granted to construct the proposed Pedestrian Underpass No. 1 as set forth in the Project Plans (See Exhibit 1A).

17. Should additional safety devices be warranted in the interest of the public safety, and/or the use of different materials be required for constructing any of the proposed improvements, Western Springs agrees to conform all of the construction and installation work to the decisions of the Commission and – as appropriately ordered – IDOT.

18. Western Springs agrees to comply with all applicable rulings, rules and regulations of the Commission in the construction, operation and maintenance of Pedestrian Underpass No. 1.

WHEREFORE, the Petitioner, Western Springs, requests that the Illinois Commerce Commission enter an Order providing for the following relief:

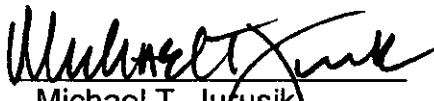
- A. Authorizing The Burlington Northern and Santa Fe Railway Company and the Village of Western Springs to construct Pedestrian Underpass No. 1 as set forth in the Project Plans (Exhibit 1A), all as deemed necessary by the Commission to protect the public safety and welfare of the statewide traveling

public in their use of the below and at-grade crossings, and all other safety implements and devices as deemed necessary for the public safety by the Commission;

- B. Assigning the costs involved with Pedestrian Underpass No. 1 to The Burlington Northern and Santa Fe Railway Company and the Village of Western Springs in accordance with the terms set forth in the Cooperation Agreement (Exhibit 1) as well as any other safety implements and devices as deemed necessary for the public safety by the Commission. The proposed construction of Pedestrian Underpass No. 1 includes, but is not limited to, the specifications set forth in the Project Plans attached hereto, and all other safety implements and devices as deemed necessary for the public safety by the Commission;
- C. Directing Respondent Burlington Northern and Santa Fe Railway Company and the Village of Western Springs to complete construction of Pedestrian Underpass No. 1 within 36 months from the date of the Commission's Order;
- D. Directing Respondents Burlington Northern and Santa Fe Railway Company and the Illinois Department of Transportation to assist the Village of Western Springs, to the extent required by the Cooperative Agreement, to complete the installation of Pedestrian Underpass No. 1 and its related improvements; and

- E. Providing for such other or further relief as the Commission may deem appropriate.

Respectfully submitted,
VILLAGE OF WESTERN SPRINGS

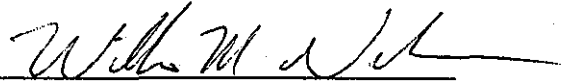
By: 
Michael T. Jurusik
one of its attorneys

Date: 4/28/04

Michael T. Jurusik
Jacob H. Karaca
KLEIN, THORPE AND JENKINS, LTD.
20 North Wacker Drive, Suite 1660
Chicago, Illinois 60606-2905
(312) 984-6400
Atty No. 90446
Attorneys for Village of Western Springs

VERIFICATION

Under the penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

By: 
William Nelson,
Director of Municipal Services,
Village of Western Springs

Date: 7-28-04

Michael T. Jurusik
Jacob H. Karaca
KLEIN, THORPE AND JENKINS, LTD.
20 North Wacker Drive, Suite 1660
Chicago, Illinois 60606-2905
(312) 984-6400
Atty No. 90446
Attorneys for Village of Western Springs

BNSF Agreement No. _____
Western Spring Pedestrian Tunnel
Mileposts 14.95
Chicago Division
Chicago Subdivision
Line Segment 71

COOPERATIVE AGREEMENT

This is an Agreement ("Agreement") dated April 22, 2004 ("Effective Date"), by and between The Burlington Northern and Santa Fe Railway Company ("BNSF"), a Delaware corporation, and the Village of Western Springs, Illinois (the "Local Agency"), a governmental unit of the State of Illinois.

WHEREAS, the Local Agency proposes to construct one pedestrian underpass crossing of BNSF's rail corridor at approximately milepost 14.95 BNSF's Chicago Division, Chicago Subdivision, Line Segment 71, all as shown on the attached Exhibit.

WHEREAS, the said underpass crossing (and its appurtenances) and the portion of the Pedestrian Walkways (and its appurtenances) located on BNSF's rail corridor are herein referred to, collectively, as the "Crossing."

WHEREAS, BNSF and the Local Agency desire to undertake a course of action that includes the following elements:

- Completion of the construction work and ancillary work contemplated by the attached Exhibits A and B (the "Work" or the "Project"), provided BNSF receives a written Notice to Proceed from the Local Agency. The Plans and Specifications for the Work, as approved by BNSF and the Local Agency, are attached as Exhibit A (the "Approved Plans").
- The Local Agency completing all of the Work, except those items of Work specifically allocated to BNSF, as assigned to it on Exhibit B (the "Local Agency Work"). The portion of the Work that is the responsibility of the Local Agency shall be at the Local Agency's sole cost and expense. BNSF shall complete all of the work assigned to it on Exhibit B (the "BNSF Work").
- BNSF granting the Local Agency temporary construction access as needed for the completion of the Local Agency Work.
- BNSF granting the Local Agency a license for the operation and maintenance of the Crossing.

WHEREAS, the Local Agency intends to accomplish the Local Agency Work via a construction contract or contracts (whether one or more, the "Construction

Contract") with a construction contractor or contractors (whether one or more, the "Contractor").

NOW THEREFORE, in consideration of the foregoing premises, and in further consideration of the promises and undertakings set forth below, BNSF and the Local Agency agree as follows:

1. (a) (1) Provided BNSF receives a written Notice to Proceed from the Local Agency, BNSF shall perform the items of Work assigned to it on **Exhibit B** (the "BNSF Work"). The cost estimate for the BNSF Work is set forth on the attached **Exhibit C**. Except as otherwise provided for herein, the Local Agency agrees to pay up to \$624,430.00 of the cost of BNSF Work, provided that it receives or is allocated said funds from a pending Federal grant (the "Federal Grant"). If the Federal Grant funds are not received or allocated for the Work, then this Agreement shall terminate without any liability or penalty imposed on either party. BNSF will pay the difference between the cost of the BNSF Work and \$624,430.00 (hereinafter referred to as the "Excess Costs"). BNSF agrees that it will not be reimbursed by the Local Agency for any Excess Costs paid by BNSF.

(2) The actual cost of the BNSF Work includes labor, materials, tools, equipment, and BNSF's usual and customary overheads and additives.

(3) BNSF will bill the Local Agency on a monthly basis for costs incurred by BNSF in connection with the BNSF Work.

(4) In the event the Local Agency shall fail to pay any monies due to BNSF within thirty (30) days after receipt of BNSF's bill therefore, the Local Agency shall have ten (10) calendar days to cure said nonpayment. The financial payments due under this Agreement will be made within thirty (30) days after receipt of the monthly invoice and any interest due for a late payment or nonpayment shall be paid by the Village in accordance with the Local Government Prompt Payment Act (50 ILCS 505/1 et seq.).

(b) The Local Agency shall, at no cost to BNSF, perform the items of Work assigned to it in **Exhibit B** and all other Work not expressly assigned to BNSF, provided that it receives or is allocated the Federal Grant funds mentioned above in Subsection 1(a)(1).

(c) Prior to opening the Crossing for use by its invitees, the Local Agency shall, at its cost, furnish and install signs, acceptable to BNSF, instructing users of the Crossing to stay on the walkways and within the fenced area

(d) BNSF shall relocate or rearrange BNSF's communication lines, signal lines, signals, and other facilities as may be necessary, in the opinion of BNSF, for the performance of the BNSF Work

(e) The Local Agency shall make arrangements for such relocation or rearrangement of wire lines, pipelines, fiber optic cables, and other facilities not owned by BNSF as may be necessary to the performance of the Work, all at no cost to BNSF.

(f) The Local Agency shall, at its sole cost and expense, remove or obliterate graffiti on and within the Crossing.

(g) The Local Agency and BNSF shall cooperate to schedule and coordinate their respective portions of the Work, so that the Work may be commenced promptly and completed without undue delay.

2. (a) Through this Agreement, BNSF hereby grants to the Local Agency two (2) licenses (the "Construction License" and the "Operating License"). Through the Construction License, BNSF hereby grants to the Local Agency the right to enter upon the Construction Parcel as shown on the attached Exhibit D for the purpose of the Local Agency's Contractor performing the Local Agency Work, all in strict conformance with the Approved Plans (see Section 3, below). Through the Operating License, BNSF hereby grants to the Local Agency the right to thereafter operate and maintain the Crossing on the Operating Parcel as shown on Exhibit D, as a pedestrian walkway for the use of the Local Agency and its invitees. The Construction License and Operating License shall be terminable by BNSF in the event of a material breach of this Agreement by the Local Agency, upon ten (10) days' written notice by BNSF to the Local Agency, which notice shall specify the nature of the breach or in accordance with the Section 1.01.03 of Exhibit F attached hereto and made a part hereof; if the Local Agency shall cure such breach in accordance with the provisions of Section 30 below, the Construction License and Operating License shall not terminate, subject to Subsection(g), below. A material breach (also known as a default hereunder) is defined at Section 30 below.

(b) The Construction License and Operating License are granted subject to all the terms and conditions set forth in this Agreement. The term of the Construction License shall be a period of thirty-six (36) months from the Effective Date of this Agreement, subject to and taking into account construction schedules of BNSF and the Local Agency in attached Exhibit B and related matters including force majeure. Subject to Section 2(f) below, the term of the Operating License shall be fifty (50) years from the Effective Date of this Agreement, subject to automatic annual renewal for one-year terms thereafter for the duration of the useful life of the Crossing. If either party desires not to renew this Agreement during any one of the renewal terms, said party shall provide six (6) months prior written notice of its intent to terminate this Agreement. If BNSF decides to not renew this Agreement for a reason that is unrelated to safety or interference with its railroad operations, the Local Agency shall abandon the Crossing in its place and shall not be responsible for or obligated for performing any activities or paying any costs set forth in Section 2(h) below.

(c) BNSF, upon ten (10) days' prior written notice to the Local Agency (or, in an emergency situation, upon notice as soon as practicable), reserves the right to use the Construction and Operating Parcels for any use or purpose that does not

materially and adversely interfere with the uses contemplated by the Construction License and Operating License.

(d) The Construction License and Operating License are granted subject to leases, licenses, permits, easements, liens, and other rights and interests heretofore granted by (or otherwise obtained from) BNSF or its predecessors in interest, whether or not of record.

(e) Any and all cuts, fills, embankments, or excavations necessary to the construction of the Work shall be made and maintained in such manner, form, and extent as will provide adequate drainage of and from the adjoining lands of BNSF; and whenever and wherever such cut, fill, excavation, or embankment shall obstruct or impair the pre-existing drainage from said adjoining lands, the Local Agency shall construct and maintain such culverts or drains as may be required to preserve such pre-existing drainage and shall also, whenever necessary, construct extensions of existing drains, culverts, or ditches through or along BNSF's rail corridor, with such extensions to be of adequate sectional dimensions to preserve the flowage of drainage or other waters, and such extensions shall be constructed with materials and workmanship as good as those now existing.

(f) In the event BNSF, in the exercise of its reasonable judgment and discretion, determines that it is necessary or appropriate for BNSF to reconstruct, rearrange, or restructure its railroad tracks or other railroad facilities in the vicinity of the Crossing, or to construct or install new railroad tracks or railroad facilities in the vicinity of the Crossing, or in the event BNSF, in the exercise of its reasonable judgment and discretion, determines that the operation of the Crossing would impair or interfere with any existing or proposed use of its rail corridor for railroad purposes and BNSF has used all commercially reasonable efforts to avoid such interference, then, in any such case, the Local Agency shall bear the full cost of any reconstruction, modification, relocation, or other changes to the Crossing that may, in BNSF's sole judgment, be reasonably necessary or appropriate to conform to the changes to BNSF's railroad tracks and/or railroad facilities or to eliminate the impairment or interference with such existing or proposed use of BNSF's rail corridor for railroad purposes.

(g) (1) The Local Agency shall require the successful Contractor, at its sole cost and expense, to procure and maintain during and through the completion of the construction of the Crossing and the Pedestrian Walkways the insurance coverages required by **Exhibit E (Contractor's Right of Entry Form)** attached hereto and made a part hereof. The original policy must be delivered to BNSF prior to any entry upon the Construction and Operating Parcels or the performance of any of the Work.

(2) The Local Agency shall, at its sole cost and expense, procure and maintain in effect during the life of this Agreement a policy of insurance, in form and substance acceptable to BNSF, and issued by an insurer acceptable to BNSF, or certificate of coverage issued by its joint risk sharing and claims management pool, that affords coverage for the Work and for the operation, maintenance, and use of the

Crossing and the portion of the Pedestrian Walkways that are located on BNSF's rail corridor. Such policy shall provide coverage for personal and bodily injuries and property damage, shall be endorsed to cover the obligations assumed by the Local Agency pursuant to this Agreement, and shall also be endorsed to delete any exclusion or limitation of coverage for occurrences on or within a certain distance of railroad property or railroad tracks. Additionally, the policy shall be endorsed to provide (i) that any exclusions related to explosions, collapse, or underground hazards (except for underground hazards involving pollution) have been deleted from the policy; and (ii) that the policy shall be primary but only as to the liability of the Local Agency and its indemnification provisions set forth in Section 16 below. The Local Agency's current insurance coverage issued by its joint risk sharing and claims management pool excludes coverage for underground hazards involving pollution. The policy shall include a severability of interests endorsement and shall also be endorsed to name BNSF as an additional insured, and to provide that the policy shall not be cancelled or materially amended unless and until BNSF is given at least thirty (30) days advance written notice of same. The Local Agency shall self insure any deductible or self-insured retention under the policy, and shall cover any claims or occurrences to the extent of such deductible or self-insured retention. The Local Agency shall provide BNSF with an original certificate of insurance, in form acceptable to BNSF or make available for inspection the coverage document issued by its joint risk sharing and claims management pool, prior to commencing the Work, and on an annual basis thereafter. The certificate of insurance or certificate of coverage shall note all endorsements agreed upon in this Agreement and shall be sent to BNSF at the following address (or such other address as BNSF may specify from time to time):

The Burlington Northern and Santa Fe Railway Company
Risk Management Department
2500 Lou Menk Drive
Fort Worth, Texas 76131

Upon request, the Local Agency shall provide BNSF with a certified duplicate of the policy. Unless and until modified as provided below, the policy limits (personal or bodily injury and property damage combined) shall be no less than five million dollars (\$5,000,000.00) per occurrence and ten million dollars (\$10,000,000.00) in the aggregate. At intervals of no less than five (5) years, BNSF may reasonably modify the insurance requirements in this Subsection (g)(2) to reflect then-current risk management practices in the railroad industry and then-current underwriting practices in the insurance industry, and the Local Agency shall comply with such modified requirements to the extent that such coverage is commercially available within the Local Agency's annual budgetary constraints, or otherwise, the Agreement shall terminate, subject to the provisions of Section 2(h) below.

(3) Notwithstanding anything to the contrary elsewhere in this Agreement, BNSF, at its option, may immediately barricade and close the Crossing and/or immediately suspend or terminate the Construction License and Operating

License, without prior notice to the Local Agency, in the event the Local Agency fails or refuses to comply with the requirements of this Subsection (g).

(h) Except in the case of a non renewal of this Agreement by BNSF for a reason that is unrelated to safety or interference with its railroad operations as set forth in Section 2(b) above, if the Construction License or Operating License is terminated for any other reason by either party, the Crossing and its appurtenances shall, at BNSF's option: (1) become BNSF's sole and exclusive property; (2) upon written notice from BNSF to the Local Agency, the Crossing shall be removed and the rail corridor restored to its original condition at the sole cost and expense of the Local Agency; or (3) the Crossing shall be abandoned in place in accordance with the specifications set forth by BNSF and the rail corridor restored to a condition satisfactory to BNSF, at the sole cost and expense of the Local Agency. In connection with any such removal and/or restoration, BNSF shall perform all restoration and removal pertaining to the BNSF Work, and the Local Agency shall perform all restoration and removal pertaining to the Local Agency Work. The provisions of Sections 12 and 13, below, shall apply to the Local Agency's removal and/or restoration work.

(i) In the event the Local Agency shall discontinue the Local Agency Work for a continuous period of ninety (90) days, BNSF, at its option, may restore the Construction Parcel and Operating Parcel to the condition existing prior to the commencement of the Work, all at the Local Agency's sole cost and expense.

(j) The Local Agency shall perform all activities on and about the Crossing in such a manner as not at any time to endanger or interfere with railroad operations or with BNSF's tracks, roadbed, equipment, or property. If ordered to cease using the Crossing at any time by BNSF personnel due to any hazardous condition, the Local Agency shall immediately barricade and close the Crossing, and shall not use (or allow others to use) the Crossing until such time as BNSF authorizes such use. The Local Agency acknowledges and agrees that BNSF has no duty or obligation to monitor the use of the Crossing to determine whether such usage is safe, it being solely the Local Agency's responsibility to ensure that the use of the Crossing is safe.

(k) Upon execution of this Agreement, the Local Agency shall pay to BNSF the sum of one dollar (\$1.00) as the fee for the Construction and Operating Licenses.

(l) In case of the actual or attempted eviction of the Local Agency by anyone owning or claiming title to the Construction Parcel or the Operating Parcel, or the Crossing, BNSF shall not be required to refund to the Local Agency any fee paid by the Local Agency pursuant to this Agreement, nor shall BNSF be liable for any damage or expense the Local Agency sustains in connection with such actual or attempted eviction. BNSF does not warrant its title to the Construction and Operating Parcels.

3. (a) Provided the Local Agency receives or is allocated a Federal Grant to pay for the Work costs identified in Section 1(a)(1) above, the Local Agency shall not

award the Construction Contract until notice to proceed is given to the Local Agency by BNSF's Assistant Director Public Projects (or his authorized representative). The issuance of said notice to proceed shall not be unreasonably withheld or delayed.

(b) BNSF and the Local Agency have approved the plans and specifications for the Work. The Work shall be constructed in strict conformity with the Approved Plans (Exhibit A).

(c) Any proposed changes to the Approved Plans that involve substantive changes to the design, materials or operation or use of the improvements must be approved by the Local Agency and BNSF prior to implementation, which approval shall not be unreasonably withheld or delayed. Any minor changes can be approved by the parties' representatives listed in Sections 17 and 18 below. Changes approved by BNSF and the Local Agency shall be deemed part of the Approved Plans, subject to Section 6 below.

(d) Nothing in this Agreement shall be construed or deemed to be a ratification by BNSF of the Local Agency's Work under the Approved Plans, an adoption by BNSF of the Local Agency's Work under the Approved Plans as its own, or an assumption by BNSF of liability or responsibility with respect to the Local Agency's Work under the Approved Plans (or the implementation thereof). Nothing in this Agreement shall be construed or deemed to be a ratification by the Local Agency of BNSF's Work under the Approved Plans, an adoption by the Local Agency of BNSF's Work under the Approved Plans as its own, or an assumption by the Local Agency of liability or responsibility with respect to BNSF's Work under the Approved Plans (or the implementation thereof).

4. (a) The Local Agency shall take, in a timely manner, all actions necessary and proper to the lawful establishment, construction, operation, and maintenance of the Crossing, including such actions as may be necessary to obtain any required approval or authorization from the Illinois Commerce Commission or the Illinois Department of Transportation.

(b) The Local Agency shall take, in a timely manner, all other actions and proceedings required for the full implementation of this Agreement, including (but not limited to) authorizing the Local Agency's officials to enter into all necessary agreements; authorizing the expenditure of all necessary monies; and authorizing the Local Agency's officials to take all other actions that are necessary or appropriate to the full implementation of this Agreement.

(c) The Local Agency shall comply with all applicable laws in connection with the establishment, construction, operation, and maintenance of the Crossing and shall ensure that all persons or firms performing work on the Local Agency's behalf in connection with the Crossing shall comply with all laws applicable to such work.

(d) The Local Agency shall not create or maintain upon the Construction Parcel and Operating Parcel, nor shall it allow any person or firm providing work, services, or materials for or on the Local Agency's behalf to create or maintain upon the Construction Parcel and Operating Parcel, any treatment facility, storage facility, disposal facility, transfer facility, underground storage tank, or aboveground storage tank that is subject to regulation under any Environmental Law (as defined in Section 16, below).

(e) The Local Agency shall not knowingly suffer an unlawful Release (as defined in Section 16, below) of any Hazardous Substances (as defined in Section 16, below) or violation of any federal or state environmental law on or about the Construction and Operating Parcel which is caused by or arises from Local Agency, its agents, employees, invitees, and contractors. The Local Agency shall use its best efforts to promptly respond to any such unlawful Release or violation and at Local Agency's sole risk and expense, will take timely measures to investigate, remediate, respond to or otherwise cure such unlawful Release or violation affecting the Construction or Operating Parcel to the extent required by the Illinois Environmental Protection Agency, the United States Environmental Protection Agency and/ or any governmental authority having jurisdiction over the property and in accordance with all applicable federal or state laws and regulations ("the Environmental Measures"). The Local Agency also shall give BNSF immediate notice of all Environmental Measures undertaken on behalf of the Local Agency to investigate, remediate, respond to or otherwise cure such known unlawful Release or violation. BNSF agrees to reasonably cooperate and assist the Local Agency in the performance of the Environmental Measures required herein, provided however, that nothing in this subsection requires BNSF to expend any money to assist the Local Authority in the performance of the Environmental Measures. Except for performing the Environmental Measures which are required by the Illinois Environmental Protection Agency, the United States Environmental Protection Agency and/ or any governmental authority having jurisdiction over the Construction or Operating Parcel pursuant to applicable federal and state environmental laws, the Local Agency shall have no responsibility to BNSF for the assessment, monitoring, remediation, or presence of contamination on or at the Construction or Operating Parcel.

If during the Local Agency Work soils or materials exceeding applicable standards set by the appropriate environmental agency ("Materials") are exposed; Local Agency, shall give BNSF immediate notice, and, at its sole cost, will remove and safely dispose of those Materials in accordance with applicable environmental laws. Local Agency shall indemnify, protect and defend BNSF from any and all liability, claims or demands, if any, which arise as a result of exposure and /or removal of such Materials. The parties shall cooperate to assess containment and/or remediation solutions in the event that the Materials extend beyond the Construction or Operating Parcel.

(f) The Local Agency shall notify BNSF's Resource Operations Center at (800) 832-5452 within 24 hours of becoming aware of (i) any an unlawful Release of Hazardous Substances on or about the Construction and Operating Parcel; (ii) any actual violation of any Environmental Law in connection with the design,

construction, inspection, repair, renewal, maintenance, reconstruction, existence, operation, use, misuse, relocation, or removal of the Crossing (and/or the portion of the Pedestrian Walkways located on and about BNSF's rail corridor); or (iii) any inspection or inquiry relating to the Crossing (and/or the portion of the Pedestrian Walkways located on and about BNSF's rail corridor) by governmental authorities charged with enforcing any Environmental Law.

(g) Except for any condition caused by or actually undertaken by BNSF or its agents, employees, invitees, contractors or Affiliates, the Local Agency shall promptly notify BNSF in writing of any condition or activity upon the Construction and Operating Parcel which creates an unreasonable risk of harm to persons, property, or the environment, and the Local Agency shall take timely and appropriate action to prevent injury to persons or property arising out of such condition or activity. The Local Agency's notification of BNSF shall not relieve the Local Agency of any other obligation imposed on it by this Agreement. The Local Agency shall respond promptly to BNSF's request for information regarding any such said condition or activity.

5. Time is of the essence for the performance of this Agreement.

6. The Local Agency and BNSF shall complete construction of their respective Work, all in accordance with the Approved Plans (see Section 3), no later than 36 months after the Effective Date of this Agreement, subject to and taking into account construction schedules of BNSF and the Local Agency in attached **Exhibit B** and related matters including force majeure. To the extent BNSF's Work deviates from the Approved Plans, BNSF shall submit, in writing, to the Local Agency a detailed description of the deviations from the Approved Plans or a set of "As-Built Plans" so that the Local Agency can comply with Section 8(b) below.

7. (a) The Local Agency will administer the Construction Contract and will inspect the construction of the Work. BNSF's personnel shall have the right, as the work progresses, to enter within the Work areas to make any inspections deemed necessary but will have no responsibility to supervise the work of the Contractor.

(b) The provisions of Subsection (a) of this Section are not intended to relinquish, nor shall they be construed to relinquish, the authority of BNSF or its representatives to exercise BNSF's rights as property owner, including (but not limited to) the right to review and mutually agree upon the location of any field offices, material staging and storing locations, access to and within BNSF's rail corridor, and other activities that may adversely affect the operations of BNSF.

8. (a) All Local Agency Work shall be done in a good and workmanlike manner and shall be performed at such time and in such manner as not to interfere with any facilities located on the Construction Parcel and Operating Parcel, the movement of trains or traffic upon the tracks of BNSF, or the maintenance of said facilities and tracks.

(b) All Work performed by BNSF shall be performed in a good and workmanlike manner. Promptly after the completion of the BNSF Work and upon provision of BNSF's written confirmation of compliance with the Approved Plans or submittal of either a written, detailed description of the deviations from the Approved Plans or a set of "As-Built Plans", the Local Agency shall deliver to BNSF a written acceptance of such Work or provide BNSF with any exceptions to the Approved Plans or "As-Built Plans." BNSF shall make any changes to the improvements shown on the Approved Plans or "As-Built Plans" as mutually agreed to by the parties. Thereafter, upon BNSF's written confirmation of compliance with the Approved Plans or "As-Built Plans," as agreed to by the parties, and the Local Agency's written verification of same, (which shall be received by BNSF within 30 days of Local Agency's receipt of BNSF's written compliance), and subject to the provision of 8(c) below, BNSF shall be deemed to have met its obligations to perform such Work and shall be relieved of any liability or responsibility to perform or repair any portion of the Work on the Crossing structure that occurs below the bridge deck level, and the Local Agency shall assume all such liability and responsibility for the portion of the BNSF's Work on the Crossing structure that occurs below the bridge deck level.

(b) (i) Project Documentation: BNSF, at its own cost, agrees to prepare, maintain and provide to the Local Agency, documents relative to BNSF Work consistent with the level of documentation normally maintained by BNSF for such work and such additional documentation as may be mutually agreed upon between the parties. BNSF shall cooperate fully in permitting the Local Agency or its consultants to gather or prepare information on BNSF Work that may be required as a condition of the Federal Grant, the Illinois Department of Transportation or other sources of funding.

(c) BNSF hereby expressly disclaims any implied or express warranties of any type or nature, including (but not limited to) warranties of merchantability or suitability for a particular purpose, with respect to the BNSF Work, except that BNSF shall be responsible and liable for any design defects in the Crossing structure and any construction defects in its Work for a one year period ("Warranty Period") that commences from the date of the Local Agency's written verification of the BNSF's compliance with the Approved Plans or the "As-Built Plans" as set forth in Section 8(b) above. After such Warranty Period, except as set forth in Section 16 below, BNSF shall be relieved of any and all liability with respect to the design, construction, maintenance, presence or use of the Crossing or the Work.

(d) The Local Agency will include in the Construction Contract BNSF's requirements for contractors working within BNSF's rail corridor, as contained in the Contractor's Right of Entry Agreement attached hereto as Exhibit E, and shall require the Contractor to execute said Contractor's Right of Entry Agreement.

(e) The Local Agency shall not commence the Local Agency Work until: (i) BNSF is provided a copy of the executed Construction Contract, (ii) the Contractor and BNSF have executed the Contractor's Right of Entry Agreement, (iii) the Local Agency has provided BNSF with proof of insurance in accordance with this

Agreement, and (iv) the Contractor has provided BNSF with proof of insurance in accordance with the Contractor's Right of Entry Agreement.

9. BNSF shall furnish such flagging and other protective services as in BNSF's reasonable judgment may be necessary to the safety of railroad operations and the protection of BNSF's property during the construction of the Work, all as contemplated by Exhibit E. BNSF shall bill the Local Agency for the costs of providing such flagging and other protective services in accordance with BNSF's collective bargaining agreements' hourly rates set forth in Exhibit E. Said flagging costs shall be paid by the Local Agency.

10. The Local Agency and its Contractor shall notify BNSF at least ten (10) days prior to the Contractor's start of construction and will arrange for a site meeting where BNSF will identify BNSF's utilities, both above ground and, if any, underground. BNSF has provided information it has regarding utilities which the Local Agency has noted on its drawings. BNSF does not warrant the accuracy or completeness of information it may provide relating to the presence of such fiber optic cables or signal or communication lines, and the Local Agency's and the Contractor's operations shall at all times be subject to the liability provisions in this Agreement and Exhibits E and F. In the event there is evidence that a fiber optic cable may be present, the Local Agency shall cause the Contractor to contact the owner of the fiber optic cable to determine its location. In no event shall the Local Agency or the Contractor ignore warning signs indicating that fiber optic cable is present.

11. The Local Agency will own and maintain the Crossing structure from the bridge deck level down, all at no cost or expense to BNSF, subject to Section 8 (b and c).

12. Subject to Section 8(b and c), following the completion of the Work as herein described, the Local Agency shall own and be fully responsible for the repairs and maintenance, future construction or reconstruction of that portion of the Crossing structure including the bridge deck and all Crossing structure improvements below said bridge deck that are constructed either by the BNSF or the Local Agency as part of this Agreement. BNSF shall own and be responsible for the repairs and maintenance, future construction or reconstruction of its railroad tracks, ballast, and all other BNSF equipment and facilities, whether existing or repaired or constructed as part of BNSF's Work under this Agreement, and BNSF shall assume all such liability and responsibility for such railroad tracks, ballast, and all other BNSF equipment and other facilities. The Local Agency agrees that it will do nothing and permit nothing to be done in the maintenance of said structure, which will interfere with or endanger facilities of BNSF. Excluding routine maintenance, improvements and periodic repairs or replacements by the Local Agency, if any major repairs or additions are undertaken to the Crossing, the same shall be designed, planned, engineered and contracted for by the Local Agency, at its sole cost and expense, but each such major repair or addition shall be subject to the prior written approval of BNSF as to concept, practicality, plans, designs, specifications, location and impact on railroad operations. For purposes of this Agreement, the term

"major repair" shall have the same definition as set forth at Chapter VI, Section A of the Lease Agreement dated March 21, 2001 (See Exhibit F-1).

(a) For the duration of this Agreement, BNSF shall inspect the Crossing structure in accordance with BNSF's customary inspection practices and shall provide the Local Agency with a copy of each report and related documents that are generated relative to each inspection within thirty (30) days of the completion of the report.

13. Following completion of the Work, if the Local Agency shall retain a contractor to perform any work (other than inspections and routine maintenance) on any portion of the Crossing, the contractor shall be required to execute a Contractor's Right of Entry Agreement in the form of the attached Exhibit E (or such other form as may be acceptable to BNSF) prior to entering upon BNSF's rail corridor. If such entry occurs more than two (2) years after the date of this Agreement, BNSF shall have the right (1) to increase the insurance limits set forth in Exhibit E to reflect the coverage limits then generally required by BNSF and shall also have the right to require such other types of insurance as are then generally required by BNSF for similar projects, and (2) to modify the safety requirements set forth in Exhibit E to reflect the safety requirements in effect at the time of such future entry upon BNSF's rail corridor.

14. Following completion of the Work, if the Local Agency's employees shall perform any work (other than inspections and routine maintenance) on any portion of the Crossing, the Local Agency shall comply with the requirements of Sections 3 and 4 of Exhibit E (as the same may be modified by BNSF pursuant to Section 13, above) in connection with such work. For the purposes of the preceding sentence, all references to "Contractor" in said Sections 3 and 4 shall be deemed to be references to the Local Agency.

15. Nothing in this Agreement is intended or shall be construed as establishing a relationship of agency, partnership, or joint venture between the parties hereto. Each party hereto shall retain the sole right to control its own employees.

16. (a) As used in this Agreement when capitalized as shown, the following terms have the following meanings:

"Affiliate" means any corporation or firm that is owned or controlled by BNSF that is under common ownership or control with BNSF, or that owns or controls BNSF.

"CERCLA" means the Federal Comprehensive Environmental Response, Compensation and Liability Act, as amended.

"Claims" means claims and liabilities of any nature whatsoever, including (but not limited to) demands, causes of action, suits, judgments, damages (including, but not limited to, general, special, actual, liquidated, punitive, and exemplary damages), losses, environmental liabilities (including, but not limited to, Natural

Resource Damages and Response Costs), costs, expenses, fines, penalties, exactions, court costs, alternative dispute resolution costs, and costs of defense and investigation (including, but not limited to, experts' fees, investigators' fees, witness fees, and attorneys' fees).

"Environmental Law" means any and every law (including common law), statute, code, ordinance, rule, regulation, order, judgment, decree, and injunction as currently in effect or amended or promulgated from time to time pertaining to the protection of human health or the environment, including (but not limited to) the federal Clean Air Act; the federal Clean Water Act; the federal Resource Conservation and Recovery Act; the federal Solid Waste Disposal Act; the federal Occupational Safety and Health Act; the federal Mine Safety and Health Act; the federal Emergency Planning and Community Right to Know Act; CERCLA; the federal Toxic Substances Control Act; the federal Oil Pollution Act; the federal Hazardous Materials Transportation Act; the federal Insecticide, Fungicide and Rodenticide Act; the federal Safe Drinking Water Act; any rules, regulations, or orders promulgated under any of the foregoing federal statutes; any state statute analogous to any of the foregoing federal statutes; and any rules, regulations, or orders promulgated under any such state statute.

"Hazardous Substances" means any hazardous substance, hazardous material, hazardous waste, contaminant, pollutant, or toxic or deleterious material that is defined, listed, regulated, governed, or controlled under any Environmental Law, including (but not limited to) petroleum and petroleum products.

"BNSF Indemnified Parties" means (i) BNSF and its officers, directors, shareholders, partners, employees, agents, legal representatives, successors, and assigns, and (ii) BNSF's Affiliates and their respective officers, directors, shareholders, partners, employees, agents, legal representatives, successors, and assigns.

"Local Agency Indemnified Parties" means the Village of Western Springs and its appointed and elected officials, officers, president and board of trustees, employees, agents, legal representatives, volunteers, successors, and assigns.

"Indemnified Parties" refers to the BNSF Indemnified Parties and Local Agency Indemnified Parties collectively.

"Natural Resource Damages" means any damage to natural resources within the contemplation of CERCLA.

"Release" means "release," as such term is defined and used in CERCLA.

"Response Costs" means costs of "response" and costs of "removal," as such terms are defined and used in CERCLA, and also means any other costs incurred

to investigate, respond to, remove, remedy, abate, cover, contain, or clean up any Release of any Hazardous Substance.

(b) TO THE MAXIMUM EXTENT PERMITTED BY LAW, THE LOCAL AGENCY SHALL RELEASE, INDEMNIFY, DEFEND, AND HOLD HARMLESS THE BNSF INDEMNIFIED PARTIES, AND EACH OF THEM, FROM AND AGAINST ANY AND ALL CLAIMS, LIABILITIES, FINES, PENALTIES, COSTS, DAMAGES, LOSSES, LIENS, CAUSES OF ACTION, SUITS, DEMANDS, JUDGMENTS AND REASONABLE EXPENSES (INCLUDING, WITHOUT LIMITATION, COURT COSTS, ATTORNEYS' FEES) (COLLECTIVELY "LIABILITIES") OF ANY KIND FOR PROPERTY DAMAGE TO THE CROSSING STRUCTURE, ITS PEDESTRIAN WALKWAYS, THE CONSTRUCTION AND OPERATING PARCELS OR PERSONAL OR BODILY INJURY, INCLUDING DEATH, AND PROPERTY DAMAGE SUSTAINED BY ANY PERSON PRESENT IN THE CROSSING OR ON THE PEDESTRIAN WALKWAYS WHICH RESULT IN WHOLE OR IN PART FROM (I) THE EXERCISE OF ANY OF THE RIGHTS GRANTED TO THE LOCAL AGENCY BY THIS AGREEMENT; (II) ANY BREACH OF THIS AGREEMENT BY THE LOCAL AGENCY; (III) THE CONSTRUCTION, INSPECTION, REPAIR, RENEWAL, MAINTENANCE, RECONSTRUCTION, EXISTENCE, OPERATION, USE, MISUSE, RELOCATION, OR REMOVAL OF THE PEDESTRIAN WALKWAYS AND/OR THE CROSSINGS (SUBJECT TO THE PROVISIONS SET FORTH IN SECTIONS 8(b and c) and 12 ABOVE); (IV) ANY ACT OR OMISSION OF THE LOCAL AGENCY INDEMNIFIED PARTIES, AND EACH OF THEM, OR ITS CONTRACTORS OR SUBCONTRACTORS; (V) THE LOCAL AGENCY'S OCCUPATION AND USE OF THE CONSTRUCTION AND OPERATING PARCEL; (VI) EARTHQUAKE, LANDSLIDE, FAILURE OF POWER, RIOT, TRAIN DERAILMENT, INSURRECTION, WAR, TERRORIST ACTIVITY, ACTS OF GOD, OR (VII) ANY OTHER REASON WHATSOEVER.

THE FOREGOING RELEASE, INDEMNITY, DEFENSE, AND HOLD HARMLESS PROVISION AND THE LAST SENTENCE OF SECTION 8(c) ARE LIMITED AS FOLLOWS: IN NO EVENT SHALL THE LOCAL AGENCY INDEMNIFIED PARTIES, AND EACH OF THEM, BE RESPONSIBLE OR LIABLE TO BNSF INDEMNIFIED PARTIES, AND EACH OF THEM, FOR ANY LIABILITIES OF ANY KIND RELATING TO PROPERTY DAMAGE OR PERSONAL OR BODILY INJURY, INCLUDING DEATH, THAT OCCUR: (1) ON OR TO BNSF TRAINS AND ANY BNSF RAIL CARS, FACILITIES OR EQUIPMENT, BNSF EMPLOYEES, AGENTS, AFFILIATES AND INVITEES AND CARGO ON SAID BNSF TRAINS, PASSENGERS AND CARGO TRANSPORTED BY TRAINS PRESENT ON BNSF'S RAIL CORRIDOR AND ANY OTHER TRAINS PRESENT ON BNSF'S RAIL CORRIDOR OR (2) ON REAL PROPERTY OTHER THAN THE CROSSING, ITS PEDESTRIAN WALKWAYS, OR THE CONSTRUCTION AND OPERATING PARCELS.

ALL PERSONS USING THE CROSSING AND THE PEDESTRIAN WALKWAYS LEADING TO THE CROSSING SHALL BE DEEMED INVITEES OF THE LOCAL AGENCY, SUBJECT TO: THE LOCAL AGENCY RESERVES ITS RIGHT TO ASSERT ANY AVAILABLE TORT IMMUNITY DEFENSES OR OTHER AFFIRMATIVES DEFENSES, INCLUDING THE DEFENSE THAT SAID PERSONS ARE NOT INTENDED OR PERMITTED USERS OF THE CROSSING OR THE PEDESTRIAN WALKWAYS, IN RESPONSE TO ANY CLAIMS DIRECTED AT THE LOCAL AGENCY OR ITS ELECTED AND APPOINTED OFFICIALS, OFFICERS, EMPLOYEES, AGENTS, CONTRACTORS, AND VOLUNTEERS. THE LOCAL AGENCY SHALL NOT UTILIZE ITS TORT IMMUNITY DEFENSES TO AVOID ITS INDEMNITY, DEFENSE, AND HOLD HARMLESS OBLIGATIONS SET FORTH ABOVE.

(c) TO THE MAXIMUM EXTENT PERMITTED BY LAW, THE BNSF SHALL RELEASE, INDEMNIFY, DEFEND, AND HOLD HARMLESS THE LOCAL AGENCY INDEMNIFIED PARTIES, AND EACH OF THEM, FROM AND AGAINST ANY AND ALL LIABILITIES OF ANY KIND FOR PROPERTY DAMAGE TO BNSF'S TRAINS, EQUIPMENT, OR FACILITIES PRESENT ON BNSF'S RAIL CORRIDOR, BNSF'S TRACK AND TRACK STRUCTURE, OR FOR PERSONAL OR BODILY INJURY, INCLUDING DEATH, OR PROPERTY DAMAGE SUSTAINED BY ANY PERSONS AND CARGO ON BNSF TRAINS, PASSENGERS AND CARGO TRANSPORTED BY TRAINS PRESENT ON BNSF'S RAIL CORRIDOR OR ANY OTHER TRAINS PRESENT ON BNSF'S RAIL CORRIDOR, AND ANY BNSF INDEMNIFIED PARTIES OR INVITEES OF BNSF WHICH RESULT IN WHOLE OR IN PART FROM (I) THE EXERCISE OF ANY OF THE RIGHTS GRANTED TO BNSF BY THIS AGREEMENT; (II) ANY BREACH OF THIS AGREEMENT BY BNSF; (III) THE, CONSTRUCTION, INSPECTION, REPAIR, RENEWAL, MAINTENANCE, RECONSTRUCTION, EXISTENCE, OPERATION, USE, MISUSE, RELOCATION, OR REMOVAL OF BNSF'S TRAINS, TRACKS, FACILITIES, OR EQUIPMENT; (IV) ANY ACT OR OMISSION OF BSNF INDEMNIFIED PARTIES, AND EACH OF THEM, OR ITS CONTRACTORS OR SUBCONTRACTORS; (V) EARTHQUAKE, LANDSLIDE, FAILURE OF POWER, RIOT, TRAIN DERAILMENT, INSURRECTION, WAR, TERRORIST ACTIVITY, ACTS OF GOD; OR (VI) ANY OTHER REASON WHATSOEVER.

THE FOREGOING RELEASE, INDEMNITY, DEFENSE, AND HOLD HARMLESS PROVISION AND THE LAST SENTENCE OF SECTION 8(c) ARE LIMITED AS FOLLOWS: IN NO EVENT SHALL BNSF INDEMNIFIED PARTIES, AND EACH OF THEM, BE RESPONSIBLE OR LIABLE TO THE LOCAL AGENCY INDEMNIFIED PARTIES, AND EACH OF THEM, FOR ANY LIABILITIES OF ANY KIND RELATING TO PROPERTY DAMAGE TO THE CROSSING OR ITS PEDESTRIAN WALKWAYS OR PERSONAL OR BODILY INJURY, INCLUDING DEATH, THAT OCCURS TO PERSONS USING OR PRESENT IN THE CROSSING OR ON THE PEDESTRIAN WALKWAYS OR

ON THE CONSTRUCTION AND OPERATING PARCELS OR (2) ON REAL PROPERTY OTHER THAN BNSF'S RAIL CORRIDOR.

ALL PERSONS USING THE CROSSING AND THE PEDESTRIAN WALKWAYS LEADING TO THE CROSSING SHALL BE DEEMED INVITEES OF THE LOCAL AGENCY, SUBJECT TO: THE LOCAL AGENCY RESERVES ITS RIGHT TO ASSERT ANY AVAILABLE TORT IMMUNITY DEFENSES OR OTHER AFFIRMATIVES DEFENSES, INCLUDING THE DEFENSE THAT SAID PERSONS ARE NOT INTENDED OR PERMITTED USERS OF THE CROSSING OR THE PEDESTRIAN WALKWAYS, IN RESPONSE TO ANY CLAIMS DIRECTED AT THE LOCAL AGENCY OR ITS ELECTED AND APPOINTED OFFICIALS, OFFICERS, EMPLOYEES, AGENTS, CONTRACTORS, AND VOLUNTEERS. THE LOCAL AGENCY SHALL NOT UTILIZE ON ITS TORT IMMUNITY DEFENSES TO AVOID ITS INDEMNITY, DEFENSE, AND HOLD HARMLESS OBLIGATIONS SET FORTH ABOVE.

AS AN EXAMPLE, THE PARTIES INTEND THE ABOVE MUTUAL INDEMNIFICATION PROVISIONS TO BE INTERPRETED AS FOLLOWS: REGARDLESS OF THE CAUSE OF A TRAIN DERAILMENT (E.G., COLLAPSE OF THE CROSSING), IF SUCH DERAILMENT OCCURS OVER OR NEAR THE CROSSING AND INJURES OR KILLS TRAIN PASSENGERS AND DAMAGES THE TRAIN AND ITS CARGO, BSNF SHALL RELEASE, INDEMNIFY, DEFEND AND HOLD HARMLESS THE LOCAL AGENCY AGAINST ANY CLAIMS FOR SUCH DAMAGES, DEATHS AND INJURIES. IN THE EVENT THE SAME TRAIN DERAILMENT INJURES OR KILLS PEDESTRIANS USING THE CROSSING OR THE PEDESTRIAN WALKWAYS, THEN THE LOCAL AGENCY SHALL RELEASE, INDEMNIFY, DEFEND AND HOLD HARMLESS BNSF FROM ANY CLAIMS RELATING TO SAID INJURIES OR DEATHS TO PERSONS USING THE CROSSING OR THE PEDESTRIAN WALKWAYS.

(d) Upon written notice from the Indemnified Parties (or any of them), the Local Agency or the BNSF, as appropriate, shall assume the defense of any Claims within the scope of Subsections (b) and (c), above. If the Local Agency or BNSF retains counsel acceptable to the Local Agency's insurer or to BNSF's insurer to defend any such Claim or Claims, such counsel shall be acceptable to the Indemnified Party or Parties covered by Section 16 in question. The Local Agency or the BNSF, as appropriate, shall pay all costs incident to such defense, including (but not limited to) attorneys' fees, investigators' fees, experts' fees, witness fees, litigation and appeal expenses, alternative dispute resolution costs, settlement payments, and amounts paid in satisfaction of judgments.

(e) The improvements comprising the Pedestrian Walkways and the Crossing will be located on BNSF's rail corridor at the sole risk of the Local Agency, and none of the BNSF Indemnified Parties shall be liable for any damage to, destruction of, or theft of such improvements.

(f) All personal property (including, but not limited to, fixtures, equipment, and the like) that is brought upon BNSF's rail corridor by the Local Agency (or any person or firm acting for or on behalf of the Local Agency) in connection with the design, construction, inspection, repair, renewal, maintenance, reconstruction, existence, operation, use, relocation, or removal of the Pedestrian Walkways and/or the Crossing shall be brought upon BNSF's rail corridor at the sole risk of the Local Agency and none of the BNSF Indemnified Parties shall be liable for any damage to or destruction of such personal property.

(g) The Indemnified Parties, and each of them, are intended beneficiaries of this Section 16.

17. The Local Agency hereby designates the Director of Municipal Services, or his designee, to manage this Agreement on behalf of the Local Agency and serve as liaison between the Local Agency and BNSF.

18. BNSF's Assistant Director Public Projects (or his authorized representative) shall manage this Agreement on behalf of BNSF and serve as liaison between BNSF and the Local Agency.

19. (a) This Agreement shall inure to the benefit of and be binding upon BNSF and the Local Agency, and their respective successors and permitted assigns.

(b) The Local Agency may not assign or transfer any of its rights under this Agreement without first obtaining BNSF's written consent thereto. BNSF, in the exercise of its judgment and discretion, may deny such request, grant such request, or grant such request subject to conditions.

20. Any modification, amendment, or waiver of any provision of this Agreement must be in writing and must be signed by BNSF and the Local Agency.

21. The laws of the State of Illinois shall govern all questions and interpretations concerning the validity, construction and enforcement of this Agreement and the legal relations between the herein parties and performance under it. The parties agree that for the purpose of any litigation relative to this Agreement and its enforcement, venue shall be in the Circuit Court of Cook County, Illinois, or the United States District Court, Northern District of Illinois (Chicago), and the parties consent to the in personam jurisdiction of said Courts for any such action or proceeding.

22. If any provision of this Agreement, or any section, sentence, clause, phrase or word or the application thereof is held invalid, the remainder of this Agreement shall be construed as if such invalid part was never included and this Agreement shall be and remain valid and enforceable to the fullest extent permitted by law, provided that the Agreement, in its entirety as so reconstituted, does not represent a material change to the rights or obligations of the parties. In the event of any conflict or inconsistency between

the terms set forth in the body of this Agreement and the terms set forth in any Exhibit hereto, the terms set forth in this Agreement shall govern and control.

23. This Agreement sets forth the full agreement between BNSF and the Local Agency with respect to its subject matter and supersedes all prior negotiations, together with the Exhibits (all of which are attached hereto or incorporated herein by this reference), contains the entire agreement and understanding between the parties with respect to the subject matter and supersedes any prior understanding or written or oral agreements between them with respect to the subject matter of this Agreement. There are no representations, agreements, arrangements or understandings, oral or written, between and among the parties hereto relating to the subject matter of this Agreement, which are not fully expressed herein. No oral modification, amendment or change shall be allowed to this Agreement. Any modification, amendment or change hereto shall be in writing and approved by the parties. This Agreement supersedes and is separate from the Lease Agreement entered into by the parties on March 21, 2001, with respect to the Construction and Operating Parcels.

24. The following exhibits are attached hereto and are incorporated in this Agreement by reference or shall be attached to or incorporated herein after their approval and execution by the parties:

Exhibit A – Approved Plans and Specifications

Exhibit B – BNSF Work Description and
the Local Agency Work Description and Work Schedules

Exhibit C – Cost Estimate for BNSF Work

Exhibit D – Legal Descriptions for Construction and Operating Parcels

Exhibit E – Contractor's Right of Entry Form

Exhibit F – Contractor Requirements

Exhibit F-1 – Contract and Lease Agreement Between BNSF and the
Local Agency dated March 21, 2001 (referred to herein as
the "Lease")

25. All notices required or contemplated by this Agreement shall be in writing and shall be effective when delivered by mail or other means to the following addresses:

If to BNSF:

The Burlington Northern and Santa Fe Railway Company
Attn: Director of Suburban Services Patricia Casler
547 West Jackson Blvd., Suite 1509
Chicago, IL 60661

If to the Local Agency: Village of Western Springs
 Attn: Village Manager
 Patrick Higgins
 740 Hillgrove Avenue
 Western Springs, IL 60558-1409

A party may change its address for notice purposes by giving notice of the change to the other party.

26. This Agreement shall not be recorded or filed with the County Recorder.

27. The term of this Agreement shall commence as of the Effective Date and shall terminate upon the earlier of: (i) notice of termination pursuant to any termination provision listed herein, or (ii) expiration of the Operating License as provided for above in Section 2(a). The Effective Date of the Agreement shall be the date on which the last signatory signs the Agreement.

28. BNSF or the Local Agency shall immediately notify the other party of any known change in the condition of the Construction Parcel or Operating Parcel (including the environmental conditions) or change in federal, state or county law which may significantly affect or prevent the Local Agency from operating the Crossing or of either party performing its obligations in accordance with the provisions of this Agreement. If the Operating Parcel can no longer be used as a Crossing because of such a change in law or due to a change in the condition of the Operating Parcel which creates a bona fide public health, safety or welfare risk that cannot be abated, or if the IEPA or USEPA or other applicable federal or state agency, administrative body or governmental authority requires, directs or orders the Local Agency to abandon and/or vacate all or part of the Operating Parcel or if such abandonment is required for the Local Agency to be in compliance with any law or in the Local Agency's best reasonable interest, then this Agreement and the Operating License shall terminate and in such a case, the BNSF may take all actions available in Subsection 2(h).

29. The BNSF shall not charge or impose any kind of fee on the Local Agency or any person for using the Crossing during the term of this Agreement.

30. In the event of a failure by either party to fulfill any of its obligations under this Agreement, or in the event of a material breach of any representation or warranty of either party under this Agreement, which failure or breach continues after a notice and a demand for cure and a 30-day period for cure has passed or within such reasonable time period after notice of the default if either party initiates and actively pursues good faith remedial action to cure the default within the initial 30-day cure period, such party shall be in default, and the non-defaulting party may seek any available and appropriate remedy at law or in equity, including without limitation declaratory and injunctive relief, mandamus, specific performance and rescission.

- (a) Events of Default: Each of the following shall constitute an event of default under this Agreement upon ten (10) days prior written notice for monetary defaults and thirty (30) days prior written notice for non-monetary defaults:

- (1) Failure to pay any installment of construction payments or any other financial payment pursuant to any Section hereunder.
- (2) Causing or permitting a dangerous or hazardous condition, as defined in BNSF's reasonable discretion, to exist in the Construction Parcel or Operating Parcel or a condition that jeopardizes insurance coverages and failing to remedy such condition immediately after receipt of written notice of the condition.
- (3) Either party's failure to observe or perform any other covenant or provision of this Agreement to be observed or performed by the respective parties.
- (4) The Local Agency abandons the Crossing for a minimum thirty (30) consecutive day period without prior written notice to the BNSF.

31. Cooperation. The Local Agency and BNSF agree to fully cooperate with each other and to do all things reasonably necessary or appropriate to carry out the terms and provisions of this Agreement and to aid and assist each other in furthering the objectives of this Agreement and the intent of the parties as reflected by the terms of this Agreement.

32. No termination of this Agreement will release the Local Agency or the BNSF from any liability or obligation under this Agreement, or the Construction License and Operating License, contained herein, whether of indemnity or otherwise, resulting from any acts, omissions, events, or occurrences prior to the date of termination.

33. BNSF hereby agrees as follows:

- (a) It is not barred by law from contracting with the Local Agency for the Project contemplated herein because of a conviction for prior violations of either Sections 33E-3 or 33E-4 of the Illinois Criminal Code of 1965 (720 ILCS 5/33E-3 (Bid Rigging) or 720 ILCS 5/33-4 (Bid Rotating)); and
- (b) It is not delinquent in payment of any taxes to the Illinois Department of Revenue pursuant to Section 11-42.1-1 of the Illinois Municipal Code (65 ILCS 5/11-42.1-1), except for any taxes that may be protested or challenged by BNSF; and
- (c) It provides a drug free workplace pursuant to the Drug Free Workplace Act (30 ILCS 580/1, et seq.); and

- (d) It complies with Article 2 of the Illinois Human Rights Act (775 ILCS 5/2-101, et seq.), and the Rules and Regulations of the Illinois Department of Human Rights, including establishment and maintenance of a sexual harassment policy as required by Section 2-105 of that Article and Act.
- (e) It complies with the Americans with Disabilities Act; and
- (f) It shall comply with the Illinois Fair Employment Practices Act and the Illinois Prevailing Wage Act relative to this Project.

**THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY**

By: Gregory C Fox
Its: VP- Engineering

Date: 4-22-04

VILLAGE OF WESTERN SPRINGS

By: John W. Kravich
Its: Village President

Date: 4/7/04

EXHIBIT A